KRAAS SOLUTIONS SDN BHD v. KONSESI KOTA PERMATAMAS SDN BHD

COURT OF APPEAL, PUTRAJAYA
BADARIAH SAHAMID JCA
MARY LIM JCA
YEOH WEE SIAM JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-1102-06-2017]
28 MARCH 2018

CONTRACT: *Agreement – Concession agreement – Supply of goods – Respondent unaware of contract entered by main contractor with sub-contractor (appellant) for supply of goods – Goods delivered by appellant and in possession of respondent – Whether appellant has right to remove goods – Whether appellant's right arose pursuant to retention of title clause in supply and carpentry work agreement – Whether there was valid contract between appellant and respondent – Whether Sale of Goods Act 1957 applicable – Whether appellant could seek restitution under s. 71 of Contracts Act 1950 – Whether respondent unjustly enriched*

Pursuant to a concession agreement entered into between the respondent ('the plaintiff') on the one part, and the Government of Malaysia and Universiti Teknologi Mara ('UiTM') on the other part ('the concession agreement'), the plaintiff was granted a concession for a period of 23 years. The aforesaid facilities and infrastructure referred to a university campus for use by UiTM on a parcel of land ('the UiTM campus' or 'the project site'). It was part of the plaintiff's obligation under the concession agreement to supply 'loose and built-in furniture' to the UiTM campus. In order to implement the obligations under the concession agreement, the plaintiff appointed Tech Art Sdn Bhd ('Tech Art') as the main contractor. Pursuant to a letter of award, it was Tech Art's obligation to supply 'loose and built-in furniture/soft finishing and special equipment'. Tech Art, in turn, issued another letter of award to one Novanexus Design Studio to undertake the 'Design and Build-Loose and Built-in Furniture and Soft Furnishing' works for a contract sum of RM7,300,000. Unknown to the plaintiff, Novanexus Design Studio on its part entered into arrangements with another entity, namely Novanexus Design and Build Sdn Bhd and they then jointly and/or severally entered into arrangements with the appellant ('the defendant'), by which the defendant would supply the furniture or goods ('goods') (Novanexus Design Studio and Novanexus Design & Built Sdn Bhd referred to collectively as 'Novanexus'). The defendant claimed that it delivered the goods to the project site and the goods were now in the plaintiff's possession. The plaintiff maintained that they were forced to file the present action as the defendant intimated a desire to remove the goods from the project site

which would have been a potentially disastrous event for the plaintiff who was bound to deliver the physical possession of the goods to UiTM. In its statement of claim, the plaintiff sought declarations that (i) the plaintiff did not owe the defendant any amount; (ii) the title of the goods delivered belonged to the plaintiff; and (iii) an injunction be granted to prevent the defendant from entering the plaintiff's premises and removing the goods. On the other hand, the defendant asserted that they had a right to remove the goods and, in this regard, relied on a 'retention of title' clause found in cl. 9 in the supply and carpentry work agreement ('CSA'). The defendant thus made a counterclaim, *inter alia*, for payment of or judgment for the value of the goods delivered to the plaintiff or, alternatively, for restitution under common law and s. 71 of the Contracts Act 1950 ('the CA'), or return of the goods. The defendant contended that the Sale of Goods Act 1957 ('SOGA') had no application because the concession agreement under which the plaintiff contracted with the Government of Malaysia and with UiTM was a Standard Form of PAM Works Contract (With Quantities) 2006. The High Court Judge allowed the plaintiff's claim and dismissed the defendant's counterclaim. Hence, the present appeal.

Held (allowing defendant's appeal)
Per Yeoh Wee Siam JCA delivering the judgment of the court:

(1) Nowhere in the plaintiff's statement of claim and in the defendant's statement of defence was it pleaded that the concession agreement was a PAM works contract. The complete document of the concession agreement was not produced in court. Therefore, it could not be immediately ascertained whether the concession agreement was a PAM works contract. (para 15)

(2) The defendant's relationship arose under the CSA, made between the defendant and Novanexus. The defendant's delivery of the goods contracted under the CSA was made pursuant to the CSA. Such delivery to Novanexus who, in turn, 'supplies' the goods, namely the furniture, to Tech Art and from Tech Art to the plaintiff did not, *ipso facto*, render the supply as one made under any contractual relationship between the defendant and the plaintiff, not even one under the PAM works contract. (para 19)

(3) It was apparent that the SOGA had no application to the facts of this case. Since there was no underlying contractual relationship, let alone one for the sale of goods, the Act simply did not apply. This was a clear misdirection on the part of the HCJ and since the plaintiff's claim was allowed on this premise, the present appeal must be thus allowed. (para 35)

(4) For ss. 14, 27 and 30 of the SOGA to operate in the plaintiff's favour, the plaintiff bears the burden of proving that it paid the sum counterclaimed by the defendant for the goods. The plaintiff's payments made up to the time of the trial were payments to Tech Art and to Novanexus through Tech Art. However, there were no payments directly made to the defendant by the plaintiff. The HCJ erred by holding that even with non-payment by the purchaser, there was a sale pursuant to s. 2 of the SOGA. Therefore, the provisions of the SOGA, as relied upon by the plaintiff, did not apply to the present case. The plaintiff's claim therefore was not proved and ought to be dismissed. (paras 38, 39, 40 & 41)

(5) The plaintiff and Tech Art were not parties to the CSA which was executed between Novanexus and the defendant. Thus, the CSA binds only Novanexus and the defendant. From cl. 9, the goods become the property of 'the contractors' (Novanexus) 'upon payment of the contract sum' 'being made to the sub-contractor' (defendant). As long as the defendant was not paid by Novanexus the contract sum for the goods, the defendant would continue to have retention of title in the goods as provided in cl. 9 of the CSA. On the facts, there was no evidence that Novanexus had paid the defendant the sum of RM920,494.86 for the goods delivered by the defendant to the project site. Therefore, Novanexus, let alone Tech Art and the plaintiff, had no property or title to the goods. (paras 45 & 46)

(6) Section 71 of the CA could be properly invoked by the defendant. The defendant had a contractual relationship with Novanexus and the defendant should be paid by Novanexus for any delivery of goods to Novanexus. In this case, according to the CSA, the defendant was to deliver the goods to the plaintiff at the project site, but payment must be made to the defendant by Novanexus. Since no such payment has been made by Novanexus, it follows that the defendant was entitled to compensation, or be restored the goods delivered. Therefore, if the plaintiff wishes to retain the goods or the benefit, the plaintiff had to pay the defendant the amount claimed by the defendant. Section 71 of the CA was precisely to facilitate recovery against a party with whom there was no contractual relationship but who had nevertheless received the benefit of the defendant's lawful act which was never intended to be done gratuitously. (para 64)

(7) The plaintiff had received the goods supplied in good order and had claimed full possession and ownership over the goods thus receiving a benefit. The defendant had not been paid by any party, including the

A plaintiff. The retention of the goods delivered without payment being made to the defendant tantamount to unjust enrichment of the plaintiff for which the defendant ought to be allowed restitution by way of its counterclaim. (para 65)

Bahasa Malaysia *Headnotes*

B Berikutan satu perjanjian konsesi antara responden ('plaintif') dalam satu bahagian dan Kerajaan Malaysia dan Universiti Teknologi Mara ('UiTM') dalam satu bahagian lagi ('perjanjian konsesi'), plaintif diberi konsesi untuk tempoh 23 tahun. Kemudahan dan infrastruktur tersebut merujuk pada sebuah kampus universiti bagi kegunaan UiTM atas sebidang tanah ('kampus C UiTM' atau 'kawasan projek'). Sebahagian tanggungjawab plaintif bawah perjanjian konsesi adalah untuk membekalkan 'loose and built-in furniture' ke kampus UiTM. Bagi melaksanakan tanggungjawabnya bawah perjanjian konsesi, plaintif melantik Tech Art Sdn Bhd ('Tech Art') sebagai kontraktor utama. Melalui satu surat award, Tech Art berkewajipan membekalkan D 'loose and built-in furniture/soft finishing and special equipment'. Tech Art sebaliknya mengeluarkan surat award kepada Novanexus Design Studio untuk melaksanakan kerja-kerja 'Design and Build-Loose and Built-in Furniture and Soft Furnishing' bagi jumlah kontrak RM7,300,000. Tanpa pengetahuan plaintif, Novanexus Design Studio memasuki satu pengurusan E dengan sebuah entiti berasingan, iaitu Novanexus Design and Build Sdn Bhd dan mereka kemudiannya secara bersesama dan/atau berasingan memasuki satu pengurusan dengan perayu ('defendan'), di mana defendan akan membekalkan perabot atau barangan ('barangan') (Novanexus Design Studio dan Novanexus Design and Built Sdn Bhd dirujuk secara kolektif sebagai F 'Novanexus'). Defendan menyatakan telah menghantar barangan tersebut ke kawasan projek dan barangan tersebut kini dalam milikan plaintif. Plaintif mengekalkan bahawa mereka terpaksa memfailkan tindakan ini kerana defendan berhasrat untuk mengalihkan barangan tersebut dari kawasan projek yang berkemungkinan membawa keburukan kepada plaintif yang terikat untuk menghantar milikan fizikal barangan tersebut kepada UiTM. G Dalam penyataan tuntutannya, plaintif memohon deklarasi-deklarasi bahawa: (i) plaintif tidak berhutang apa-apa jumlah kepada defendan; (ii) hak milik barangan yang diserahkan adalah kepunyaan plaintif; dan (iii) satu injunksi diberi untuk menghalang defendan daripada memasuki kawasan plaintif dan mengalihkan barangan tersebut. Sebaliknya, defendan H menyatakan bahawa mereka mempunyai hak untuk mengalihkan barangan tersebut dan, berkaitan ini, bergantung pada klausa 'retention of title' di kl. 9 dalam perjanjian bekalan dan kerja-kerja pertukangan kayu ('PBP'). Defendan, oleh itu, membuat tuntutan balas, antara lain, bagi pembayaran atau penghakiman untuk nilai barangan yang dihantar kepada plaintif, atau I secara alternatifnya, untuk restitusi bawah common law dan s. 71 Akta Kontrak ('Akta'), atau pemulangan barangan tersebut. Defendan

menghujahkan bahawa Akta Jualan Barangan 1957 ('SOGA') tidak terpakai kerana perjanjian konsesi yang di bawahnya plaintif memasuki kontrak dengan Kerajaan Malaysia dan UiTM adalah Borang Standard Kontrak Kerja PAM (Dengan Kuantiti) 2006. Hakim Mahkamah Tinggi membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Dengan itu, rayuan ini.

Diputuskan (membenarkan rayuan defendan)
Oleh Yeoh Wee Siam HMR menyampaikan penghakiman mahkamah:

(1) Tiada di mana-mana pun dalam penyataan tuntutan plaintif dan penyataan pembelaan defendan ada diplidkan bahawa perjanjian konsesi adalah kontrak kerja PAM. Dokumen lengkap perjanjian konsesi tidak dikemukakan di mahkamah. Oleh itu, tidak boleh disahkan segera sama ada perjanjian konsesi adalah kontrak kerja PAM.

(2) Hubungan defendan timbul bawah PBP, yang dibuat antara defendan dan Novanexus. Penghantaran defendan untuk barangan yang dikontrakkan bawah PBP dibuat menurut PBP. Penghantaran tersebut kepada Novanexus yang sebaliknya 'membekalkan' barangan tersebut, iaitu, perabot, kepada Tech Art dan daripada Tech Art kepada plaintif tidak, secara *ipso facto*, menjadikan bekalan tersebut terangkum dalam mana-mana hubungan kontrak antara defendan dan plaintif, juga bukan bawah kontrak kerja PAM.

(3) Jelas bahawa SOGA tidak terpakai pada fakta kes ini. Oleh sebab tiada hubungan kontrak tersembunyi, lebih-lebih lagi untuk jualan barangan, Akta tersebut tidak terpakai. Ini jelas salah arahan pada pihak HMT dan oleh sebab tuntutan plaintif dibenarkan atas alasan ini, rayuan ini, oleh itu, mesti dibenarkan.

(4) Bagi ss. 14, 27 dan 30 SOGA beroperasi berpihak pada plaintif, plaintif mempunyai beban untuk membuktikan telah membayar jumlah yang dituntut balas oleh defendan bagi barangan tersebut. Bayaran plaintif yang dibuat setakat perbicaraan adalah bayaran-bayaran kepada Tech Art dan kepada Novanexus melalui Tech Art. Walau bagaimanapun, tiada bayaran oleh plaintif secara langsung kepada defendan. Hakim Mahkamah Tinggi khilaf apabila memutuskan bahawa tanpa bayaran sekalipun oleh pembeli, wujud jualan berikutan s. 2 SOGA. Oleh itu, peruntukan-peruntukan SOGA yang disandarkan oleh plaintif tidak terpakai dalam kes ini. Oleh itu, tuntutan plaintif tidak dibuktikan dan wajar ditolak.

(5) Plaintif dan Tech Art bukan pihak dalam PBP yang dimeterai antara Novanexus dan defendan. Oleh itu, PBP mengikat hanya Novanexus dan defendan. Berdasarkan kl. 9, barangan tersebut menjadi hak milik 'kontraktor' (Novanexus) 'apabila dibayar jumlah kontrak' 'dibayar kepada sub-kontraktor' (defendan). Selagi defendan tidak dibayar oleh Novanexus jumlah kontrak bagi barangan tersebut, defendan kekal

mempunyai hak milik dalam barangan tersebut seperti yang diperuntukkan dalam kl. 9 PBP. Berasaskan fakta, tiada keterangan bahawa Novanexus membayar defendan jumlah RM920,494.86 untuk barangan yang dihantar oleh defendan ke kawasan projek. Oleh itu, Novanexus, dan bukan sahaja Tech Art dan plaintif, tiada milikan atau hak milik dalam barangan tersebut.

(6) Seksyen 71 Akta boleh dibangkitkan sewajarnya oleh defendan. Defendan mempunyai hubungan kontrak dengan Novanexus dan defendan mesti dibayar oleh Novanexus bagi apa-apa penghantaran barangan kepada Novanexus. Dalam kes ini, menurut PBP, defendan sepatutnya menghantar barangan kepada plaintif ke kawasan projek, tetapi bayaran mesti dibuat kepada defendan oleh Novanexus. Oleh sebab tiada bayaran dibuat oleh Novanexus, defendan dengan itu berhak mendapat pampasan, atau barangan yang dihantar dikembalikan. Oleh itu, jika plaintif ingin mengekalkan barangan atau faedah daripadanya, plaintif mesti membayar kepada defendan jumlah yang dituntut oleh defendan. Seksyen 71 Akta adalah khusus untuk memudahkan pengembalian semula terhadap pihak yang mana dengannya tiada hubungan kontrak tetapi telah menerima faedah daripada tindakan sah defendan yang tidak diniatkan untuk dibuat secara percuma.

(7) Plaintif telah menerima barangan yang dibekalkan dalam keadaan yang baik dan telah menuntut milikan bagi barangan itu dan dengan itu telah mendapat faedah. Defendan tidak dibayar oleh mana-mana pihak, termasuk plaintif. Penyimpanan barangan yang diserahkan tanpa membayar kepada defendan bermaksud pengkayaan tidak patut oleh plaintif yang baginya, defendan wajar dibenarkan pengembalian melalui tuntutan balas.

Case(s) referred to:

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation) [1986] 1 LNS 30 SC ***(refd)***

Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor [1967] 1 LNS 161 PC ***(refd)***

Tanjung Teras Sdn Bhd v. Kerajaan Malaysia [2015] 9 CLJ 1002 CA ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 71

Sale of Goods Act 1957, ss. 2, 14, 19, 27(1), 30(1)

For the appellant - Vishnukumar R Visvanathan & Caroline Mary George; M/s Syed Alwi & Ng & Co

For the respondent - Jasvinjit Singh; M/s Jasvinjit Singh & Co

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: WA-22NCVNC-642-10-2016 (overruled).]

Reported by Sandra Gabriel

JUDGMENT

Yeoh Wee Siam JCA:

Appeal

[1] This is an appeal by the defendant (or "appellant") against the decision of the High Court given on 17 May 2017, after a full trial, which allowed the claim of the plaintiff (or "respondent") and dismissed the counterclaim of the appellant with costs of RM38,000.

Salient Facts

[2] The salient facts as set out by the learned High Court Judge ("judge") can be summed up as follows.

[3] Pursuant to a concession agreement dated 21 February 2013 entered into between the plaintiff of the one part and the Government of Malaysia and Universiti Teknologi Mara ("UiTM") of the other part ("the concession agreement") (AR Pt A and B Vol 1 at Pt C pp. 259-269), the plaintiff was granted a concession for a period of 23 years (including the construction period) to carry out the design, development, construction and maintenance of the facilities and infrastructure (as defined therein) and carry out the asset management services (as defined therein).

[4] The aforesaid facilities and infrastructure refer to a university campus for use by UiTM in Rembau, Negeri Sembilan, on a parcel of land then held under Geran 74041, Lot 472, Mukim Kundor, District of Rembau, State of Negeri Sembilan measuring approximately 80 acres ("the UiTM campus" or "the project site").

[5] It was part of the plaintiff's obligation under the concession agreement to supply "loose and built-in furniture" to the UiTM campus. In order to implement the obligations under the concession agreement, the plaintiff appointed Tech Art Sdn Bhd ("Tech Art") as the main contractor. The appointment of Tech Art was done *via* a letter of award dated 8 May 2013 (AR Pt C pp. 270-284).

[6] Pursuant to the letter of award, it was Tech Art's obligation to supply "loose and built-in furniture/soft finishing and special equipment". Thereafter, Tech Art appointed specialist contractors to provide various services and/or to supply the relevant goods. Hence, Tech Art in turn issued a letter of award dated 2 January 2014 to one Novanexus Design Studio to undertake the "design and build-loose and built-in furniture and soft furnishing" works for a contract sum of RM7,300,000 (AR Pt C pp. 285-301).

[7] Unknown to the plaintiff, Novanexus Design Studio on its part entered into arrangements with another entity, namely Novanexus Design and Build Sdn Bhd and they then jointly and/or severally entered into arrangements

with the defendant, by which the defendant would supply the furniture or goods ("goods") (Novanexus Design Studio and Novanexus Design & Built Sdn Bhd are referred to collectively as "Novanexus"). These arrangements are evidenced by purchase orders, delivery orders and invoices and a supply and carpentry work agreement dated 20 June 2016 between Novanexus and the defendant ("the CSA") (AR Pt C pp. 311-343).

[8] The defendant claims that it delivered the goods to the project site between 3 July 2016 and 8 September 2016. The goods are now in the plaintiff's possession.

[9] By this action, the plaintiff contends that the general property in the goods delivered by the defendant to the UiTM campus (as alleged by the defendant) is now vested in the plaintiff. According to the plaintiff, the term "general property" in goods is synonymous with "title".

[10] The plaintiff maintains that they were forced to file this action as the defendant intimated a desire to remove the goods from the project site which would have been a potentially disastrous event for the plaintiff who was bound to deliver the physical possession of the goods to UiTM. On the other hand, the defendant asserts that they have a right to remove the goods and, in this regard, rely on a "retention of title" clause found in cl. 9 in the CSA.

The Plaintiff's Claim

[11] In its statement of claim, the respondent claims against the appellant the following reliefs:

(a) Suatu deklarasi bahawa Plaintif tidak terhutang dengan Defendan didalam apa jua jumlah pun;

(b) Suatu deklarasi bahawa hakmilik (title) didalam apa jua barangan yang dihantar serah dan kini didalam pegangan Plaintif adalah kepunyaan sah Plaintif;

(c) Defendan olehnya sendiri, ejen atau pekhidmatnya atau selainnya ditahan dan suatu injunksi dengan ini diberikan menahannya daripada memasuki tapak Projek tersebut atau dalam apa jua cara sekalipun cuba untuk mengambil balik apa jua barangan daripada tapak projek tersebut tanpa kelulusan Plaintif;

(d) Bahawa gantirugi termasuk gantirugi berganda dan gantirugi teladan ditaksirkan oleh Mahkamah yang Mulia ini dan diperintahkan dibayar oleh Defendan kepada Plaintif;

(e) Faedah atas apa jua gantirugi yang mungkin ditaksirkan dibayar pada kadar 5% setahun atas dasar terkompoun setiap bulan dari tarikh pemfailan Writ disini sehingga tarikh penyelesaian penuh;

(f) Kos tindakan ini atas dasar peguamcara-anak guam;

(g) Apa jua atau lain relief yang difikirkan wajar dan suai manfaat diberikan;

The Appellant's Counterclaim

[12] The appellant made a counterclaim, *inter alia*, for payment of or judgment for the value of the goods delivered to the respondent or, alternatively, for restitution under common law and s. 71 of the Contracts Act 1950, or return of the goods. In para. 31 of its counterclaim against the respondent, the appellant prays for the following orders and reliefs:

(a) Judgment for the sum of RM920,494.86;

(b) In the alternative Judgment by way of an order for restitution for the sum of RM920,494.86;

(c) In the alternative that the Plaintiff do deliver up to the Defendant all goods delivered by the Defendant under the "Supply & Carpentry Works Agreement" dated 20.6.2016 and particularised under the "Particulars of Purchase Orders, Invoices and Delivery Orders";

(d) Interest at 5% per annum on the sum of RM920,494.86 from the date of service of this Defence and Counterclaim to the date of judgment and thereafter interest at 5% per annum on the judgment sum until full and final settlement;

(e) Costs of the Counterclaim; and

(f) Such further or other relief that this Honourable Court deems fit and proper to grant.

Our Decision

[13] After hearing the appeal on 13 December 2017, we made a unanimous decision to allow the appellant's appeal and consequently, the counterclaim.

Grounds Of Decision

The Nature Of The Concession Agreement And Its Position Vis-à-vis The Appellant

[14] In submissions before us, the appellant contends that the Sale of Goods Act 1957 ("SOGA") has no application because the concession agreement under which the respondent contracted with the Government of Malaysia and with UiTM is a standard form PAM works contract (with quantities) 2006. This was similarly the case with the contract between the respondent and Tech Art and Tech Art with Novanexus. PAM works contracts as is the case with other standard form construction contracts are comprehensive contracts where there are specific provisions dealing with the issue of title, passing of title and conditional delivery. Consequently, there was no room for application of the SOGA which in any case is mercantile law which is incompatible with a PAM works contract.

[15] We are unable to properly consider this argument as this was not actually a pleaded issue between the parties. Be that as it may, we observe that nowhere in the respondent's statement of claim and in the appellant's

A statement of defence is it pleaded that the concession agreement is a PAM works contract. The complete document of the concession agreement was not produced in court. Only part of the concession agreement ie, ten pages thereof was exhibited (AR Pt A and B Vol 1 at Pt C pp. 259-269). From the ten pages made available to the court at trial, it cannot be immediately B ascertained whether the concession agreement is a PAM works contract.

[16] On the other hand, we can safely say that both the contracts between the respondent and Tech Art, and between Tech Art and Novanexus are a PAM works contract. In the case of the contract with Tech Art, this is evident from the letter of award seen at appeal record ("AR") Vol 3 Pt B C pp. 698-750 and the letter of award dated 2 January 2014 seen at AR Pt C pp. 285-301. There also appears to be no dispute on this.

[17] In our view, regardless whether or not this is a standard PAM works contract (with quantities) 2006, what may be reasonably deduced from the pleadings and the documents presented at trial is that the relationship D between the respondent and Tech Art and between Tech Art and Novanexus were purely contractual. That contractual relationship emanates from an agreement not only to construct, design, develop and maintain facilities and infrastructure as defined under the concession agreement, but also to carry out asset management services also as defined in the concession agreement. E That concession agreement is for a period of 23 years with the various parties, subsequent to the respondent, who have been subcontracted as nominated subcontractors to do particular aspects of the work under the concession agreement.

[18] But, as far as the relationship between the immediate parties in this F appeal is concerned, it is undisputed that there is no contractual relationship between them. The respondent has even pleaded that to be the case at para. 13 of its statement of claim. In fact, there is also no contractual relationship either between the appellant and Tech Art.

G **[19]** The appellant's relationship arises under the CSA, made between the appellant and Novanexus. The appellant's delivery of the goods contracted under the CSA was made pursuant to the CSA. Such delivery to Novanexus who in turn "supplies" the goods, namely the furniture, to Tech Art and from Tech Art to the respondent does not, *ipso facto*, render the supply one made under any contractual relationship between the appellant and the respondent, H not even one under the PAM works contract. This is regardless of Tech Art's relationship with the appellant. In any case, Tech Art was never a seller of the goods; it was the main contractor for the concession agreement pursuant to the letter of award of 9 May 2013.

I *The Supplementary Agreement Between Novanexus And The Appellant*

[20] The supplementary agreement will be dealt with at two levels: in relation to the respondent's claim, and as one of the basis for the appellant's counterclaim.

[21] Taking it in the first respect, the question that next arises is whether by virtue of the existence of the supplementary agreement dated 13 September 2016 made between the appellant and Novanexus, there is then a contractual relationship between the appellant and the respondent. Under cl. 2(ii) of the supplementary agreement, the appellant is entitled to make a claim for the sum of RM920,424.86 directly against Tech Art. In the event Tech Art does not pay, the appellant is granted full authority and approval under cl. 2(vi), to claim that sum directly from the respondent. The operation of this supplementary agreement is not in dispute.

[22] It is our considered view that having examined the terms of the supplementary agreement, we remain firm on our earlier conclusions. The supplementary agreement and the CSA are entirely different contracts made for different purposes. The supplementary agreement is far from being a contract of sale such as to bring the relationship between the appellant and the respondent within the ambit and application of the SOGA.

[23] The learned judge did not address the respondent's claim in the manner that we have. Instead, His Lordship took both the claim and counterclaim together, and considered that the question of whether the *Romalpha* or retention of title clause in cl. 9 of the CSA applies depends on whether the clause had been brought to the attention of the respondent. His Lordship found that the respondent was not aware of cl. 9 of the CSA, neither was it even aware of the existence of the appellant. Consequently, the clause did not operate to bind the respondent. The High Court went further to find that the supplementary agreement "cannot bind the plaintiff in any way".

[24] It was erroneous for the learned judge to have analysed the claim and the counterclaim in those terms. Since His Lordship was prepared to recognise that the supplementary agreement was between the appellant and Novanexus, His Lordship ought to have reminded himself of what the underlying relationship between the appellant and the respondent was, if any, before proceeding to consider the application or otherwise of ss. 2, 14 and any other provisions of the SOGA that were relied on by the respondent.

[25] Instead, at para. 48 of his judgment, the learned judge said that the "issue here is that pursuant to s. 2 SOGA, non-payment by the purchaser does not mean that there is no sale" and then proceeded to find for the respondent at paras. 48 and 49 of his judgment.

[26] In our view, the learned judge was obliged to determine whether the Act even applies at all before considering whether specific provisions of the SOGA had been breached. Had His Lordship properly directed himself, His Lordship would have found that there was no basis, in law and on the facts, for the application of the Act.

Whether The SOGA Applies

[27] The learned judge allowed the respondent's claim based mainly on the application of ss. 14, 27(1) and 30 of the SOGA which provide as follows:

Implied undertaking as to title; etc.

14. In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:

(a) an implied condition on the part of the seller, that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass;

(b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods;

(c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

Sale by person not the owner

27. (1) Subject to this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell:

Provided that where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.";

Seller or buyer in possession after sale

30. (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale,

pledge, or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

[28] The learned judge considered the submissions of the respondent regarding the above provisions and stated his views which can be summed up as follows.

[29] The respondent contends that it received the goods *bona fide* from Tech Art without notice of the appellant's claim thereto. By relying on s. 14 of the SOGA, the respondent is entitled to assume that Tech Art and Novanexus (the sub-contractor) had the right to sell the goods and the property in the goods therein passes at the time of delivery. Therefore, the respondent will have quiet possession of the goods free from any charge or encumbrance in favour of any third party not declared or known to the respondent before it received the goods.

[30] Based on s. 27 of the SOGA, the respondent contends that the goods were sold by a person who is not the owner thereof (Novanexus), and who does not sell them under the authority or with the consent of the owner (appellant). The buyer (Tech Art) acquires no better title to the goods than the seller (Novanexus) had, unless the owner (appellant) of the goods is precluded by his conduct from denying the seller's authority to sell. The proviso to s. 27(1) is a statutory form of estoppel and applies to the present facts where the appellant unconditionally allowed the goods to be delivered to the project site and acting on the faith of the same, the project architect has since certified the works as completed on 23 September 2015. The project site has now been handed to the respondent who in turn issued a certificate of availability to UiTM on 5 October 2016. This triggered a joint inspection of the facilities and acceptance of the same, save for some defects which had to be rectified. The respondent also relies on the proviso to s. 27 of the SOGA which provides that a mercantile agent (Novanexus) is, with the consent of the owner (appellant), in possession of the goods. Any sale by him (Novanexus) when acting in the ordinary course of business of a mercantile agent shall be as valid as if he were expressly authorised by the owner (the appellant) of the goods to make the same, provided that the buyer (Tech Art/respondent) acts in good faith and has not at the time of the contract of sale, notice that the seller (Novanexus) has no authority to sell.

[31] In order to rely on the proviso, the respondent takes the position that Novanexus is a "mercantile agent". The respondent then relies on s. 30(1) of the SOGA.

[32] Based on s. 30(1) of the SOGA, the respondent contends that where a person (appellant/Novanexus), having sold goods, continues or is in possession of the goods, the delivery or transfer by that person (appellant/Novanexus) of the goods under any sale to any person (Tech Art/respondent)

receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer (Novanexus) were expressly authorised by the owner (appellant) of the goods to make the same.

[33] Aside from the argument that the parties are bound by the standard terms as found in PAM works contract 2006, the appellant reiterated that the relationship between the parties, if any, is not a "goods sale transaction", and that Novanexus was never a mercantile agent within the meaning of the Act. In any case, pursuant to s. 19 of the SOGA, regard must be given to the terms of the underlying contract between the parties, the conduct of the parties and the circumstances of the case.

[34] The respondent had relied on ss. 14, 27 and 30 of the SOGA to maintain its claim for the declaratory orders at para. 31 of the statement of claim.

[35] Having made our observations on the lack of any legal contractual relationship between the parties in this appeal, it is apparent that the SOGA has no application to the facts of this case. Since there is no underlying contractual relationship, let alone one for the sale of goods, the Act simply does not apply. This is a clear misdirection on the part of the learned judge and since the respondent's claim was allowed on this premise, the appeal must be thus allowed.

[36] In any event, regarding s. 14 of the SOGA, we are of the view that there must be a sale of the goods by the seller to the buyer before the implied condition in para. (a) and the implied warranties in paras. (b) and (c) of the same section can be enjoyed by the buyer. In this case, it is an undisputed fact that the respondent (purported buyer) did not have a contract of sale for the goods (the furniture) with the appellant (purported seller). There is no proof of payment of the sum of RM920,494.86, as claimed by the appellant in its counterclaim, by the respondent to prove that the sale of the goods went through and therefore the general property of the same has passed to the respondent.

[37] Regarding s. 27 of the SOGA, the respondent cannot avail itself of the proviso thereto since the respondent or "mercantile agent" does not have "the consent of the owner" (appellant) to be "in possession of the goods or of a document of title to the goods". By the fact that the appellant made the counterclaim, it is ample proof that without being paid the sum of RM920,494.86 by the respondent, the appellant did not consent to the same.

[38] Thus, in our view, for ss. 14, 27 and 30 of the SOGA to operate in the respondent's favour, the respondent bears the burden of proving that it has paid the sum counterclaimed by the appellant for the goods. At the time of the trial before the judge, the respondent maintained that to that date, it

had paid Tech Art a sum of approximately RM6.04 million out of the total contract sum of RM6.8 million. A further sum of RM500,000 was the design fees due to Novanexus. According to the respondent, the retention amount is 10% of the same up to a maximum of 5% of the contract sum, meaning that apart from the RM6.04 million, there is a further amount of about RM365,000 which has been certified as due and payable to Novanexus Design Studio. Thus, the value paid out to Novanexus is approximately RM6.37 million. The surplus sum in respect of the goods is approximately RM430,000. The respondent contends that they have already incurred more than that sum in obtaining alternative supplies due to the default by Novanexus. At the time of hearing of the appeal, according to the submissions of learned counsel for the respondent, even though the respondent had paid RM6,737,900 for the goods, Tech Art still owes them approximately RM1.8 million, but another RM562,000 is still owed by them to Novanaxus (see annexure to witness statement of respondent's project director in AR vol 2 Pt B and vol 1 Pt C p. 207).

[39] We observe from the respondent's payments made up to the time of the trial, that there are payments to Tech Art, and to Novanexus through Tech Art. However, it is noted that there were no payments by the respondent directly to the appellant. Despite the fact that the respondent had not paid the appellant for the goods, the judge held, *inter alia*, in para. 48 of his grounds of judgment as follows:

> In so far as the issue of payments that are to be made by the plaintiff to Tech Art Sdn Bhd is concerned, the view that I take is that although there is no documentary evidence that the plaintiff does not owe Tech Art Sdn Bhd, it is clear from the evidence of PW1 that the final quantum is yet to be determined as the "final audit" has not been completed. Whatever may be the case, the issue is solely between the plaintiff and Tech Art Sdn Bhd and is of no concern to the defendant. The defendant may or may not have recourse to Tech Art Sdn Bhd but that is a different matter altogether and I make no comment on this either way as it may well be the subject of another action in the future. In any event, whether the plaintiff has fully settled its payment obligations with Tech Art Sdn Bhd or not, the issue here is that pursuant to section 2 SOGA, non-payment by the purchaser does not mean that there is no sale. In so far as the conduct of the defendant is concerned, I take the view that they are precluded from asserting any title to the goods that were delivered because the plaintiff was not aware of the existence of the defendant as an end supplier and more importantly, the plaintiff is not a party to the Supply and Carpentry Agreement which contains the retention of title clause and cannot therefore be bound by those terms …'.

[40] With respect, we are of the considered opinion that the learned judge erred by holding that even with non-payment by the purchaser, there is a sale pursuant to s. 2 of SOGA. From our perusal of the said section, we note that s. 2 is the interpretation section in the SOGA where certain words or terms

have been defined eg, "buyer", "delivery", "future goods", "property", "specific goods" etc. Section 2 does not contain substantive provisions to expressly state that even with non-payment there is a sale.

[41] For the reasons expressed, the provisions of the SOGA as relied upon by the respondent do not apply to the present case. The respondent's claim therefore was not proved and ought to be dismissed.

The Effect Of The Retention Of Title Clause

[42] From the submissions of both parties, we conclude that the appellant's contract with Novanexus, ie, the (CSA), is a sale of goods contract.

[43] The appellant relies on the *Romalpha* or retention of title clause in cl. 9 of the CSA. That clause provides as follows:

> VESTING OF GOODS, MATERIALS AND SPECIFICATIONS
>
> **All goods, materials and Specifications** which form part of the Supply of Goods and Services and the Plans and Specifications as described in Schedule 2 (hereinafter, collectively, the **"Goods") shall become the property of The Contractors upon delivery to the Project site, and upon payment of The Contract Sum (or such part thereof attributable to such Goods) being made to the Sub-Contractor**, and shall not be removed from the Project Site without the prior written consent of The Contractors. Goods, materials and specifications yet to be delivered to the Project Site for incorporation into the Supply of Goods and Services shall become the property of The Contractors when any sum is included in a tax invoice in respect thereof **and upon payment of the Contract Sum (or such part thereof attributable to such Goods) being made to the Sub-Contractor**, and thereafter the Sub-Contractor shall not remove or cause or permit the same to be moved from the Project Site or elsewhere without the prior written consent of The Contractors (emphasis added)

(Note: "contractor" in the above cl. 9 refers to Novanexus, and "sub-contractor" refers to the appellant)

[44] The respondent and Tech Art took the position that they had no knowledge of cl. 9 of the CSA. The respondent submits that at no time prior to the final delivery of the goods on 8 September 2016 did the appellant make its existence known to the respondent. The respondent only came to know of the appellant's existence and claim to the goods on 5 October 2016 when the appellant forwarded several documents, including the CSA, to the respondent.

[45] It is clear from the position taken by the respondent and Tech Art that they are not parties to the CSA which was executed between Novanexus and the appellant. Thus, the CSA binds only Novanexus and the appellant. From cl. 9, it is clear, as asserted by the appellant, that the goods become the property of "the contractors" (Novanexus) "upon payment of the contract

sum" "being made to the sub-contractor" (appellant). For as long as the appellant is not paid by Novanexus the contract sum for the goods, the appellant would continue to have retention of title in the goods as provided in cl. 9 of the CSA.

[46] In this case, there is no evidence that Novanexus had paid the appellant the sum of RM920,494.86 for the goods delivered by the appellant to the project site. Therefore, Novanexus, let alone Tech Art and the respondent, has no property or title to the goods.

[47] Although the supplementary agreement is not for a sale of any goods, the CSA is a sale of goods contract to which the SOGA applies and cl. 9 is consistent with the terms of s. 19 of the Act. The evidence shows that the appellant has not been paid, certainly not by Novanexus. Therefore the appellant is entitled to retain title in the goods under cl. 9. While the goods may have been delivered to the project site and may have been delivered through the different parties, figuratively and in theory pursuant to the various contracts, title however does not pass by virtue of this clause. This then brings us to the alternative defence that the appellant relies on, namely the *nemo dat* principle.

Nemo Dat Quod Non Habet ("Nemo Dat") Principle

[48] In the alternative, the appellant relies on the common law principle of *Nemo dat* ("no one gives who possesses not").

[49] In view of our earlier ruling that the provisions of the SOGA do not apply in the context of the appellant and the respondent, that to date the appellant has not been paid by any party and due to the presence of cl. 9 of the CSA, we are of the opinion that the appellant can invoke the *nemo dat* principle to assert its legal ownership of the goods even though the goods have been delivered to the project site. Since no title has passed from the appellant, the respondent could never acquire title.

Counterclaim

[50] The appellant's counterclaim for the sum of RM920,494.86 is based, *inter alia*, on the terms of the supplementary agreement.

[51] As pleaded by the appellant, by a supplementary agreement dated 13 September 2016, between Novanexus Design Studio and Novanexus Design and Built Sdn Bhd as joint contractors and the appellant ("supplementary agreement") (AR Pt C pp. 386-391), it was agreed that the terms of payment under cl. 3.2.1 of the principal agreement (ie, the CSA dated 20 June 2016) be varied and that the initial agreed sum of RM952,842.28 be reduced by RM52,300 and be increased by a variation order by RM19,952.58 thus producing RM920,494.86 as the agreed sum due owing. It was further agreed as follows:

(a) at sub-cl. 2(i), that the appellant had fully complied with its obligations under the principal agreement; and

(b) at sub-cl. 2(vi), that in the event no payment is received from Tech Art, then the appellant would be at liberty to claim the sums due directly from the respondent.

[52] By a letter dated 10 August 2016 issued by Nova Nexus Design Studio, a request had been made by them to their principal, ie, Tech Art, for Tech Art to make direct payments to Nova Nexus Design Studio suppliers and contractors who have remained unpaid by Nova Nexus Design Studio.

[53] By their own admission in an undated letter to Nova Nexus Design Studio, Tech Art had admitted that they were aware that the sub-contractors appointed by Nova Nexus Design Studio had not been paid leading to delays in the completion of the project.

[54] By a letter dated 13 September 2016, Nova Nexus Design Studio granted written authority to Tech Art to make payments due to the appellant directly to the appellant without going through Nova Nexus Design Studio for a mutually varied sum amounting to RM920,494.86 only. In the event that Tech Art was unable to make the payments due, then the appellant could proceed directly to the respondent to obtain the payments due.

[55] By a letter dated 3 October 2016, the respondent was informed by the appellant of the approvals given by Nova Nexus Design Studio and the necessary invoices and supporting documents were forwarded by the appellant to the respondent together with a statutory declaration dated 4 October 2016.

[56] The appellant's tax invoice dated 20 September 2016 bearing no. NOVA-2016-09-001 for the sum of RM920,494.86 issued to Nova Nexus Design Studio and Novanexus Design and Built Sdn Bhd remains unpaid.

[57] From a careful perusal of the supplementary agreement, it is clear that notwithstanding the terms of such agreement, there is no privity of contract between the appellant and the respondent. Thus, despite the fact that Tech Art did not make payments to the appellant either through Novanexus, or directly to the appellant, the appellant would not be able to make a contractual claim, based on the supplementary agreement, against the respondent. Similarly, the respondent is not legally entitled to keep the goods on the basis that it had paid Tech Art, when at the end of the chain, the appellant was not paid in full for his goods delivered to the project site.

[58] Since there is no privity of contract between the respondent and the appellant, the respondent's claim for remedy ought to be made against Tech Art, but not the appellant.

Whether Section 71 Of The Contracts Act 1950 ("CA") Applies

[59] The appellant further relies on s. 71 of the CA which provides as follows:

> **Obligation of person enjoying benefit of non-gratuitous act**
>
> 71. Where a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. (emphasis added)

[60] In *Tanjung Teras Sdn Bhd v. Kerajaan Malaysia* [2015] 9 CLJ 1002 the Court of Appeal considered the Privy Council case of *Siow Wong Fatt v. Susur Rotan Mining Ltd & Anor* [1967] 1 LNS 161 PC and held that to succeed in a claim under s. 71 of the CA, four conditions must be fulfilled, namely that the doing of the act:

(a) must be lawful;

(b) must be done for another person;

(c) must not be intended to be done gratuitously; and

(d) must be such that the other person enjoys the benefit of the act or the delivery.

[61] In *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441 at p. 477, the Federal Court observed that in the case of *New Kok Ann Realty Sdn Bhd v. Development & Commercial Bank Ltd New Hebrides (In Liquidation)* [1986] 1 LNS 30; [1987] 2 MLJ 57 the Supreme Court held that the trial judge had rightly given judgment under s. 71 of the CA and considered that all the four conditions in that section had been satisfied and the respondent had therefore established their claim under the said section.

[62] The appellant submits that based on the factual matrix of the matter before this court, the goods were supplied and delivered by the appellant to the project site wherein the respondent was the concessionaire to the project. The fact that the appellant was to receive payment from Novanexus or the joint contractors does not alter the fact that the appellant never intended the works ie, the supply and delivery of the furniture, to be done gratuitously. The respondent is enjoying the benefit of the said delivery, and the certificate of practical completion has since been issued. Therefore, since the conditions to s. 71 of the CA have been fulfilled, compensation must be paid to the appellant as the respondent has enjoyed the benefit of the appellant's act.

[63] The learned judge ruled, however, that there is no evidence that when the goods were delivered by the appellant to the project site, that they were doing so for the benefit of the respondent as "the other". If anything,

"the other" in the present context is Novanexus, with whom the appellant had a contractual relationship. As such, the learned judge concluded that one of the important criteria for a claim under s. 71 of the CA is absent.

[64] With respect, we are of the view that s. 71 of the CA can be properly invoked by the appellant, and we agree with the above submissions of the appellant. It is true, as stated by the learned judge, that the appellant has a contractual relationship with Novanexus and the appellant should be paid by Novanexus for any delivery of goods to Novanexus. In this case, according to the CSA, the appellant was to deliver the goods to the respondent at the project site, but payment must be made to the appellant by Novanexus. Since no such payment has been made by Novanexus, it follows that the appellant is entitled to compensation, or be restored the goods delivered [(see *Dream Property* (*supra*), and *Tanjung Teras* (*supra*)]. Therefore, if the respondent wishes to retain the goods or the benefit, the respondent has to pay the appellant for the amount claimed by the appellant. With respect, we cannot agree with the learned judge's reasoning as it would render s. 71 meaningless. Section 71 is precisely to facilitate recovery against a party with whom there is no contractual relationship but who has nevertheless received the benefit of the appellant's lawful act which was never intended to be done gratuitously. This was clearly explained in *Dream Property* and *Tanjung Teras.*

Unjust Enrichment

[65] Although it was not considered by the learned judge, we agree with the submissions of the appellant that the respondent had received the goods supplied in good order and had claimed full possession and ownership over the goods thus receiving a benefit. The appellant has not been paid by any party, including the respondent. The retention of the goods delivered without payment being made to the appellant tantamounts to unjust enrichment of the respondent for which the appellant ought to be allowed restitution by way of its counterclaim [(see also *Dream Property* (*supra*)].

Conclusion

[66] After careful consideration of the submissions of both learned counsel and a perusal of the record of appeal, we find that there are merits in this appeal. We are satisfied that there are appealable errors to warrant our appellate intervention.

[67] In our opinion, the respondent has not discharged its burden of proving its claim. We do not find that title to the goods has passed even if this were a case of sale of goods *simpliciter*, which we do not find to be the case. Clearly, there is no evidence of payment of the goods by the respondent to the appellant.

[68] Accordingly, we allowed the appeal and set aside the decision and order of the High Court.

[69] Regarding the appellant's counterclaim, based on the application of the *nemo dat* principle, and s. 71 of the CA, and on the principle restitution for unjust enrichment, we allowed the counterclaim in prayers 31(a) and 31(d) (AR Vol 1 Pt A p. 64). We awarded costs of RM45,000 to be paid by the respondent to the appellant, subject to payment of the allocator fee. The deposit is to be refunded to the appellant.